

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

CONAL WILMOT and VON WILMOT,

Plaintiffs,

v.

ROBIN B. McNABB, et al.,

Defendants.

Case Number C-02-03720 JF

ORDER GRANTING MOTIONS TO
COMPEL ARBITRATION AND TO
STAY PROCEEDINGS

[Docket Nos. 23, 39, 42, 43, 44]

Defendants Cambridge Investment Research, Inc. (“Cambridge”), American Investors Company (“AIC”), National Financial Services Corporation (“NFS”), and First Trust Corporation (“First Trust”) and Fiserv, Inc. (“Fiserv”) move separately to compel arbitration and to stay proceedings in the above-entitled matter. Defendant John Roslund joins in the motion of AIC. Plaintiffs oppose. The Court has read the moving and responding papers and has considered the oral arguments of counsel presented on April 7, 2003. For the reasons set forth below, the motions brought by Cambridge, AIC, and NFS will be granted. The motion brought by First Trust and Fiserv will be granted on the condition that arbitration of Plaintiffs’ claims against First Trust and Fiserv occur within California.

1 **I. BACKGROUND**

2 On August 1, 2002, Plaintiffs Dr. Conal Wilmot and Von Wilmot filed the instant action,
3 alleging that they were defrauded by their former financial advisor, Defendant Robin B. McNabb
4 (“McNabb”), and that Defendants Cambridge, AIC, NFS, First Trust, Fiserv, and other individuals
5 and corporate entities assisted McNabb with his fraudulent scheme. Plaintiffs assert claims for
6 securities fraud under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.* (“the Exchange
7 Act”), common law fraud, breach of fiduciary duty, and breach of contract.

8 Plaintiffs, an elderly married couple who reside in Santa Cruz, California, allege the following in
9 their amended complaint. From approximately 1994 to 2001, Plaintiffs maintained a business
10 relationship with McNabb, who represented that he was a competent financial planner and investment
11 advisor. During this period, Plaintiffs entrusted McNabb and other Defendants with management of
12 their retirement accounts and other assets. Although Plaintiffs repeatedly instructed him to invest their
13 assets only in conservative, low-risk investments, McNabb invested their assets in high-risk securities
14 and other investment vehicles, engaged in excessive trading in order to generate management fees, and
15 misrepresented to Plaintiffs the state of their assets. McNabb also failed to disclose to Plaintiffs that in
16 1995 his association with AIC was terminated for mishandling client funds, that in 1999 the National
17 Association of Securities Dealers, Inc. (“NASD”) fined him \$50,000 and barred him from association
18 with any NASD member in any capacity for violating its rules, and that in 2000 the United States
19 Securities and Exchange Commission upheld the NASD’s disciplinary action. The value of Plaintiffs’
20 assets declined substantially during the course of their association with McNabb and other Defendants.

21 Plaintiffs have submitted evidence that Dr. Wilmot suffers from a progressive brain condition
22 similar to dementia and that since the mid-1990s he has manifested increasingly severe symptoms of his
23 condition. *See* Ex. B to Declaration of Denis S. Kenny; Declaration of Von Wilmot (“Wilmot Decl.”)
24 ¶¶ 4-9. They assert that Dr. Wilmot’s health has deteriorated to the point that he is unable to care for
25 himself today. *See* Wilmot Decl. ¶ 9.¹

26
27 ¹ First Trust and Fiserv object to the Declaration of Von Wilmot. In light of its disposition of
28 the instant motions, the Court concludes that it need not rule on the objection.

1 Cambridge, AIC, and NFS move to compel arbitration based on two agreements to arbitrate
2 entered into by Plaintiffs. On November 13, 1993, Plaintiffs signed a “Transmittal Form” in connection
3 with their AIC investment account. This form includes an arbitration provision specifying that “any
4 controversy between us arising out or relating to my [AIC] account . . . shall be settled by arbitration in
5 accordance with the rules, then obtaining, of the National Association of Securities Dealers, Inc.” Ex.
6 A to Declaration of Clarence Yee. On January 29, 1996, Plaintiffs opened an investment account with
7 NFS and entered into a “Brokerage Account Pre-Dispute Arbitration Agreement” with Cambridge and
8 NFS. *See* Ex. A to Declaration of Jennifer Moran. That arbitration agreement provides for arbitration
9 of “all controversies that may arise between us” concerning Plaintiffs’ NFS investment account “before
10 an independent panel of arbitrators set by either the New York Stock Exchange, Inc. or National
11 Association of Securities Dealers, Inc., as [Plaintiffs] may designate.” *Id.*

12 First Trust and Fiserv² move to compel arbitration pursuant to a third agreement entered into by
13 Plaintiffs. On August 20, 1997, Dr. Wilnot completed and executed a First Trust IRA application,
14 which states expressly that he agrees to the “Arbitration Statement” attached to the IRA application.
15 *See* Ex. 1 to First Trust’s Motion to Compel Arbitration. The “Arbitration Statement” provides that
16 any dispute arising out of the IRA will be resolved in binding arbitration before the American Arbitration
17 Association in Denver, Colorado. *See id.*

18 19 **II. DISCUSSION**

20 The moving Defendants argue that Plaintiffs must be compelled to arbitrate their claims pursuant
21 to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (“FAA”). Section 2 of the FAA provides that a
22 written agreement to arbitrate in any contract involving interstate commerce “shall be valid, irrevocable,
23 and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
24 9 U.S.C. § 2. The FAA “leaves no place for the exercise of discretion by a district court, but instead
25 mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an

26 ² First Trust is a wholly-owned subsidiary of Fiserv. *See* Affidavit of Joanne Radmore Ratkai ¶
27 3, Ex. 2 to First Trust’s Motion to Compel Arbitration.

1 arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218
2 (1985). If a district court determines that a party has failed to comply with a valid agreement to
3 arbitrate, it must order the parties “to proceed to arbitration in accordance with the terms of the
4 agreement,” 9 U.S.C. § 4, and it may stay the litigation until the arbitration process is complete. 9
5 U.S.C. § 3. Plaintiffs do not dispute that the FAA mandates arbitration in certain cases and that they
6 entered into the agreements to arbitrate at issue in this case, but they argue that those agreements are
7 invalid or unenforceable.

8 9 **A. Motions Brought By Cambridge, AIC, and NFS**

10 AIC moves to compel arbitration of Plaintiffs’ claims against it based on the agreement to
11 arbitrate contained in the AIC form signed by Plaintiffs on November 13, 1993. Cambridge and NFS
12 move separately to compel arbitration of the claims against them based on the NFS arbitration
13 agreement entered into by Plaintiffs on January 29, 1996.

14 Plaintiffs oppose the motions brought by Cambridge, AIC, and NFS, claiming that the parties
15 made a mutual mistake of fact when they entered into the two agreements to arbitrate discussed above.
16 In particular, Plaintiffs argue that they are entitled to proceed with arbitration in California before an
17 arbitration panel that is compliant with new ethics standards for arbitrators adopted by the Judicial
18 Council of California in April 2002. The new “Ethics Standards for Neutral Arbitrators in Contractual
19 Arbitration” (“the California standards”), which are codified at Division VI of the Appendix to the
20 California Rules of Court, took effect on July 1, 2002.³ Plaintiffs contend that the refusal of the New
21 York Stock Exchange, Inc. (“NYSE”) and the NASD to appoint an arbitration panel that is compliant
22 with the California standards renders their agreements to arbitrate unenforceable because of the parties’
23 mutual mistake of fact as to the availability of the arbitral fora provided by the NYSE and the NASD.

24 In *Mayo v. Dean Witter Reynolds, Inc.*, -- F.Supp.2d --, No. C-01-20336 JF (PVT), 2003
25 WL 1922963 (N.D. Cal. April 22, 2003), *amended by Mayo v. Dean Witter Reynolds, Inc.*, --
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27 ³ In December 2002, the Judicial Council approved various revisions to the California
28 standards that took effect on January 1, 2003.

1 F.Supp.2d. --, No. C-01-20336 JF (PVT), 2003 WL 21003116 (N.D. Cal. April 29, 2003), this
2 Court considered whether an individual who entered into a valid and enforceable agreement to arbitrate
3 his or her dispute before “self-regulatory organizations” (SROs) such as the NYSE and the NASD is
4 entitled to proceed before an arbitration panel that is compliant with the California standards.⁴ The
5 Court concluded that application of the California standards to SROs is preempted by the Exchange
6 Act and the comprehensive system of federal regulation of the securities industry established pursuant to
7 the Exchange Act. *Id.* at *9-*13. The Court also concluded that at least as they were applied to the
8 plaintiff in *Mayo*, the California standards also are preempted by § 2 of the FAA. *Id.* at *14-*17. The
9 Court thus determined that one who is obligated to arbitrate his or her dispute before a SRO has no
10 enforceable legal right to proceed before an arbitration panel that is compliant with the California
11 standards. *Id.* at *17.

12 For the same reasons set forth in its *Mayo* decision, the Court concludes that the plaintiffs in this
13 case are not entitled to proceed with arbitration in California before an arbitration panel that is
14 compliant with the California standards. The parties have made no mutual mistake of fact as to the
15 availability of the arbitral fora provided by the NYSE and the NASD, and Plaintiffs do not otherwise
16 dispute that the two arbitration agreements at issue are valid and enforceable. Accordingly, the motions
17 brought by Cambridge, AIS, and NFS will be granted.⁵

22 ⁴ The Court is aware that the question presented in *Mayo* arose after the Court had compelled
23 arbitration of the parties’ dispute, and that the same question is presented at an earlier stage in these
24 proceedings. This difference is irrelevant for purposes of the Court’s analysis.

25 ⁵ Defendant John Roslund joins in the motion of AIC. Roslund is not a signatory to the
26 agreement to arbitrate in the AIC form signed by Plaintiffs on November 13, 1993. However, the sole
27 allegation in the amended complaint that specifically concerns Roslund identifies only his business
28 association and residence. *See* Amended Complaint ¶ 7. Roslund’s joinder is not opposed by
Plaintiffs, and on the record before it the Court concludes that his joinder in the motion of AIC is
proper. Accordingly, the Court construes the motion of AIC as brought on behalf of AIC and Roslund.

1 **B. Motion Brought By First Trust and Fiserv**

2 First Trust and Fiserv move to compel arbitration of the claims asserted against them based on
3 the agreement to arbitrate contained in the First Trust IRA application that Dr. Wilmot completed and
4 executed on August 20, 1997. The face of the First Trust IRA application includes an
5 “Acknowledgment and Signature” section that states in relevant part: “I have read and I agree to the
6 Arbitration Statement that follows.” The “Arbitration Statement” on page two of the application
7 provides that:

8 The Account Owner hereby agrees that all claims and disputes of every type and matter
9 which may arise between the Account Owner and First Trust shall be submitted to
10 binding arbitration pursuant to the rules of the American Arbitration Association located
11 in Denver, Colorado; that such arbitration proceedings and hearings shall take place
12 only in Denver, Colorado; and that, to the extent not preempted by federal law,
13 Colorado statutory law (including without limitation the statutes governing the award of
14 damages in arbitration) and Colorado common law shall control during arbitration. The
15 Account Owner expressly waives any right he/she may have to institute or conduct
16 litigation or arbitration in any other forum or location, or before any other body.

17 Ex. 1 to First Trust’s Motion to Compel Arbitration.

18 The claims against First Trust and its corporate parent, Fiserv, are based on identical factual
19 allegations. *See* Amended Complaint ¶¶ 29, 30. Fiserv thus can enforce the arbitration agreement
20 entered into between Dr. Wilmot and First Trust even though it is not a signatory to the agreement. *J.J.*
21 *Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988) (“When the
22 charges against a parent company and its subsidiary are based on the same facts and are inherently
23 inseparable, a court may refer claims against the parent to arbitration even though the parent is not
24 formally a party to the arbitration agreement.”).

25 Plaintiffs claim that Dr. Wilmot lacked the mental capacity to execute the First Trust IRA
26 application on August 20, 1997 and that the contract, including the arbitration provision, therefore
27 should be rescinded under California law.⁶ First Trust and Fiserv contend correctly that the issue of

28 ⁶ The Court notes that Plaintiffs have not asserted any claim for rescission in their amended
complaint.

1 rescission must be decided by the arbitrator, not this Court.⁷ In *Prima Paint Corp. v. Flood &*
2 *Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Supreme Court determined that the question of whether
3 there is fraud in the inducement of a contract containing an arbitration provision should be decided by
4 the arbitrator, not the district court. *Id.* at 403. The Ninth Circuit has held that “the rationale of *Prima*
5 *Paint* extends to attempts to rescind contracts on other grounds.” *Three Valleys Mun. Water Dist. v.*
6 *E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991). Cases must “be submitted to
7 arbitration unless there is a challenge to the arbitration provision which is separate and distinct from any
8 challenge to the underlying contract.” *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir.
9 1989). In other words, the district court “may not consider defenses that challenge the validity or
10 enforceability of the entire contract.” *McCarthy v. Providential Corp.*, No. C-94-0627 FMS, 1994
11 WL 387852, *5 (N.D. Cal. July 19, 1994) (citations omitted), *appeal dismissed*, 122 F.3d 1242 (9th
12 Cir. 1997). *Accord Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001), *cert.*
13 *denied*, 534 U.S. 1133 (2002). Here, although Plaintiffs acknowledge that Dr. Wilmot signed the First
14 Trust IRA application, they seek to rescind the entire contract.⁸

15 Plaintiffs argue alternatively that the agreement to arbitrate should not be enforced because it is
16 unconscionable. Plaintiffs contend the contract as a whole is procedurally unconscionable because it is
17 a contract of adhesion and that the arbitration provision is substantively unconscionable because its
18 forum selection clause specifies venue in Denver. The FAA “requires courts to enforce privately
19 negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” *Volt Info.*
20

21 ⁷ First Trust and Fiserv also argue that Plaintiffs have waived any right to rescind the contract.
22 The Court need not address this argument because it agrees with the moving Defendants that the
23 question of whether the contract should be rescinded is an arbitrable issue.

24 First Trust and Fiserv rely on *West v. West*, 166 F.3d 1219 (9th Cir. 1998) (table of decisions
25 without reported opinions), an unpublished disposition of the Ninth Circuit. Counsel for First Trust and
Fiserv are cautioned that citation to this Court of the *West* decision violates Ninth Circuit Rule 36-3.

26 ⁸ Even if this Court were to consider Plaintiffs’ rescission argument, there is insufficient evidence
27 for it to conclude that Dr. Wilmot lacked the mental capacity in 1997 to execute the First Trust IRA
28 application. That Dr. Wilmot may be mentally incompetent at the present time does not change this
determination.

1 *Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989).
2 Nonetheless, “generally applicable contract defenses, such as . . . unconscionability, may be applied to
3 invalidate arbitration agreements without contravening § 2 [of the FAA].” *Doctor’s Associates, Inc. v.*
4 *Casarotto*, 517 U.S. 681, 687 (1996). The FAA does not preempt state law governing the
5 unconscionability of contracts of adhesion. *Ticknor*, 265 F.3d at 935, 941-42.

6 The arbitration provision at issue includes a choice-of-law clause specifying that to the extent it
7 is not preempted by federal law, Colorado law “shall control during arbitration.” Ex. 1 to First Trust’s
8 Motion to Compel Arbitration. First Trust and Fiserv contend that Colorado law thus governs the
9 Court’s unconscionability analysis. Plaintiffs contend that California law applies. Because the choice-
10 of-law clause is limited to arbitration proceedings by its own terms and thus does not extend to litigation
11 in this Court, Plaintiffs’ argument that California law governs the unconscionability analysis is persuasive.
12 The point is a significant one, because in this case it affects the outcome of the analysis.

13 Under Colorado law, “absent a conflicting and overriding public policy to the contrary in a
14 particular situation, valid agreements to arbitrate in a particular situation should be enforced as written.”
15 *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 493 (Colo. 1998). However, a court
16 may decline to enforce the terms of a contract if the factors set forth in *Davis v. M.L.G. Corp.*, 712
17 P.2d 985 (Colo. 1986), are present. *Industrial Products Int’l, Inc. v. Emo Trans, Inc.*, 962 P.2d
18 983, 988 (Colo. Ct. App. 1997). “The *Davis* factors mitigating against enforcement are: (1) a
19 standardized agreement executed by parties of unequal bargaining strength; (2) the lack of opportunity
20 to read and become familiar with the document before signing it; (3) the use of fine print in the portion
21 of the contract containing the [unconscionable] provision; and (4) the absence of evidence that the
22 provision was commercially reasonable or should reasonably have been anticipated.” *Id.* A court
23 should also consider the terms of the agreement, the relationship of the parties, and all of the
24 circumstances surrounding the formation of the contract. *Id.* Plaintiffs contend that the first *Davis*
25 factor is present because the First Trust IRA application is a standard-form contract of adhesion.
26 “Even though a contract is a printed form contract and offered on a ‘take-it-or-leave-it’ basis, these
27 features alone do not define adhesion contracts.” *Ad Two, Inc. v. City and County of Denver*, 983
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1 P.2d 128, 132 (Colo. Ct. App. 1999), *affirmed*, 9 P.3d 373 (Colo. 2000). Rather, “[t]here must be
2 a showing ‘that the parties were greatly disparate in bargaining power, that there was no opportunity for
3 negotiation, or that (the) services could not be obtained elsewhere.’” *Jones v. Dressel*, 623 P.2d 370,
4 374 (Colo. 1981) (citation omitted). While the Court can infer that First Trust and Fiserv enjoy
5 superior bargaining power to Plaintiffs and that Plaintiffs had no opportunity to modify the terms of the
6 contract, Plaintiffs have not proffered evidence or otherwise demonstrated that any of the other *Davis*
7 factors are present.

8 Colorado courts have expressed a preference for upholding forum selection clauses. *See*
9 *Vessels Oil & Gas Co. v. Coastal Refining and Marketing, Inc.*, 764 P.2d 391, 393 (Colo. Ct.
10 App. 1988); *ABC Mobile Systems, Inc. v. Harvey*, 701 P.2d 137, 139-40 (Colo. Ct. App. 1985).
11 The language of the venue provision at issue here – arbitration “shall take place only in Denver,
12 Colorado” and not “in any other forum or location” – demonstrates that it is mandatory, not permissive.
13 *Vanderbeek v. Vernon Corp.*, 25 P.3d 1242, 1248 (Colo. Ct. App. 2000), *affirmed*, 50 P.2d 866
14 (Colo. 2002). Although Denver is an inconvenient venue for Plaintiffs, it arguably is a reasonable
15 location for resolution of the parties’ dispute because First Trust is a Colorado corporation with its
16 principal place of business in Denver.⁹ The Court concludes that neither the contract at issue nor its
17 arbitration provision satisfies the criteria for unconscionability under Colorado law.

18 “Under California law, a contract is unenforceable if it is both procedurally and substantively
19 unconscionable.” *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002), *cert.*
20 *denied*, 535 U.S. 1112 (2002). The procedural element focuses on oppression or surprise due to
21 unequal bargaining power, while the substantive element focuses on whether the terms are unduly harsh
22 or one-sided. *Id.*; *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071 (2003). The elements of
23 procedural unconscionability and substantive unconscionability “operate on a sliding scale such that the
24 more significant one is, the less significant the other need be.” *Comb v. PayPal, Inc.*, 218 F.Supp.2d
25 1165, 1172 (N.D. Cal. 2002). “A contract or clause is procedurally unconscionable if it is a contract
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27 ⁹ Plaintiffs have not cited any Colorado authority indicating that a provision in an arbitration
28 agreement specifying venue in a foreign state is substantively unconscionable.

1 of adhesion.” *Id. Accord Little*, 29 Cal.4th at 1071. The California Supreme Court has defined a
2 contract of adhesion as a ““standardized contract, which, imposed and drafted by the party of superior
3 bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or
4 reject it.”” *Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83, 113 (2000) (citation
5 omitted). The contract at issue meets this definition. First Trust and Fiserv point out that the services
6 they provide may be obtained elsewhere without submission to an arbitration agreement that includes a
7 Denver venue provision. However, this Court has held that under California law the availability of
8 alternative sources for the subject services is insufficient to defeat a claim of procedural
9 unconscionability. *Comb*, 218 F.Supp.2d at 1172-73. The Court concludes that the contract at issue
10 satisfies the criteria for procedural unconscionability in California.

11 Even if the First Trust IRA application is procedurally unconscionable, however, it nonetheless
12 may be enforceable if its substantive terms are reasonable. *Id.* at 1173. As noted above, Plaintiffs
13 contend that the arbitration provision is substantively unconscionable because its forum selection clause
14 specifies venue in Denver. Plaintiffs rely on *Bolter v. Superior Court*, 87 Cal.App.4th 900 (Cal. Ct.
15 App. 2001), for the proposition that arbitration agreements that require weaker parties to resolve their
16 disputes in states geographically distant from their domiciles are substantively unconscionable. In
17 *Bolter*, the plaintiffs appealed the trial court’s order granting the defendant’s motion to compel
18 arbitration in Utah pursuant to provisions of the parties’ franchise agreement. The agreement at issue in
19 *Bolter* required that all disputes regarding the agreement be submitted for arbitration before the Salt
20 Lake City, Utah office of the American Arbitration Association. *Id.* at 908. The California Court of
21 Appeal concluded that the franchise agreement was a contract of adhesion and that its “place and
22 manner” terms were unduly oppressive to the plaintiffs. *Id.* at 907-09. The circumstances of the
23 parties were relevant to the court’s analysis: the plaintiffs were small “mom-and-pop” franchisees
24 located in California, and the party seeking to compel arbitration was an international carpet cleaning
25 corporation that recently had relocated its headquarters from California to Utah. *Id.* at 909-10.
26 Because it found that only the “place and manner” terms of the contract were substantively
27 unconscionable and that those terms were severable from the rest of the contract, the court issued a
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1 writ of mandate directing the trial court to vacate its judgment and enter a new and different order
2 striking the forum selection provision; the court did not invalidate the entire agreement to arbitrate. *Id.*
3 at 911.

4 The reasoning of *Bolter* applies here. As in *Bolter*, the arbitration agreement at issue includes a
5 venue provision that requires Plaintiffs to resolve their dispute before the American Arbitration
6 Association in a state geographically distant from their California residence. And as in *Bolter*, Plaintiffs
7 are the weaker, less sophisticated parties who contend that the costs of proceeding in the specified
8 venue are preclusive.¹⁰ In *Comb*, this Court found that inclusion in PayPal's arbitration agreement of a
9 provision that limited venue to PayPal's backyard was designed to shield PayPal from liability instead of
10 providing a neutral forum in which to arbitrate disputes. 218 F.Supp.2d at 1177. As with the
11 defendant in *Comb*, First Trust does business throughout the United States but requires individual
12 customers from across the country to travel to one locale to arbitrate their claims. Accordingly, the
13 Court concludes that the venue provision is substantively unconscionable.

14 "Under California law, courts have discretion to sever an unconscionable provision or refuse to
15 enforce the contract in its entirety." *Circuit City*, 279 F.3d at 895 (citing Cal. Civ. Code §
16 1670.5(a)). "If the illegality is collateral to the main purpose of the contract, and the illegal provision
17 can be extirpated from the contract by means of severance or restriction, then such severance and
18 restriction are appropriate." *Id.* (citing *Armendariz*, 24 Cal.4th at 124). If "the offending provisions
19 can be excised from the contract . . . then the remainder of the contract can be enforced." *Mercuro v.*
20 *Superior Court*, 96 Cal.App.4th 167, 184 (2002). Plaintiffs note correctly that there is no express
21 severability language in the First Trust IRA application. However, there is no indication that the
22 contract at issue in *Bolter* included such language, and yet the California Court of Appeal concluded
23 that the terms of a similar venue provision were "clearly severable" from the rest of the arbitration
24 agreement. 87 Cal.App.4th. at 911. As in *Bolter*, the venue provision stands alone and does not
25 permeate the contract. *See, in contrast, Armendariz, Mercuro, Circuit City, and Ferguson v.*
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27 ¹⁰ The Court notes, however, that Plaintiffs have not submitted declarations or other evidence
28 supporting this contention.

1 *Countrywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. 2002).¹¹ Even if the offending
2 provisions are not severable, they can be excised from the contract by means of limitation.
3 Accordingly, the Court finds and concludes that the following terms of the arbitration agreement are
4 unconscionable and thus unenforceable: the clause “that such arbitration proceedings and hearings shall
5 take place only in Denver, Colorado;” and the clause “in any other forum or location”¹² in the sentence
6 “The Account owner expressly waives any right he/she may have to institute or conduct litigation or
7 arbitration in any other forum or location, or before any other body.”

8 Defendants emphasize that the same arbitration provision of the First Trust IRA application
9 executed by Dr. Wilmot has been deemed valid and enforceable in unpublished decisions issued by
10 three other federal courts. *See Saunders v. First Trust Corp.*, No. CV-98-4304 CAS (MANx)
11 (C.D. Cal. filed Sept. 4, 1998) (tentative minute order), Ex. 3 to First Trust’s Motion to Compel
12 Arbitration; *O’Brien v. Hinkle*, No. 1:99CV179 (N.D. W.Va. filed Feb. 11, 2000) (order accepting
13 magistrate’s recommendation), Ex. 5 to First Trust’s Motion to Compel Arbitration; *Smith v. CNA*
14 *Financial Corp.*, No. 7:01CV00653 (W.D. Va. filed March 14, 2002) (order), Ex. 6 to First Trust’s
15 Motion to Compel Arbitration. However, none of those courts considered whether the venue provision
16 at issue here is unconscionable under California law.¹³

17 For the reasons discussed above, the Court concludes that the arbitration provision of the First
18 Trust IRA application does not satisfy the criteria for unconscionability under Colorado law but that its
19 venue provision satisfies the criteria for unconscionability under California law. Because the
20 unconscionable provision is severable from the rest of the arbitration agreement or at least subject to
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22 ¹¹ In *Circuit City*, the court found the entire arbitration agreement at issue unenforceable
23 because “the objectionable provisions pervade the entire contract” and “[r]emoving these provisions
24 would go beyond mere excision to rewriting the contract.” 279 F.3d at 896. In *Ferguson*, the court
25 found that the defendant’s “arbitration agreement is so permeated with unconscionable clauses that we
cannot remove the unconscionable taint from the agreement.” 298 F.3d at 788.

26 ¹² The inclusion of “forum” in this clause in no way indicates any opposition by this Court to
arbitration of the subject claims before the American Arbitration Association.

27 ¹³ In fact, the *O’Brien* decision does not even address the venue provision and the *Saunders*
28 decision is only a *tentative* minute order.

1 limitation, all other terms of the arbitration agreement are valid and enforceable. Accordingly, the
2 motion brought by First Trust and Fiserv will be granted, but the requirement that arbitration be
3 conducted in Denver will be stricken. Arbitration of Plaintiffs' claims against First Trust and Fiserv shall
4 proceed at an office of the American Arbitration Association located within California.

6 **III. DISPOSITION**

7 Good cause therefore appearing, IT IS HEREBY ORDERED that the motions to compel
8 arbitration brought by Defendants Cambridge, AIC, and NFS are GRANTED.¹⁴ Having considered
9 the terms of the First Trust IRA application as well as the totality of the circumstances, the Court
10 concludes that the Denver venue provision is substantively unconscionable under California law and
11 thus unenforceable. Therefore, the motion to compel arbitration brought by First Trust and Fiserv is
12 GRANTED on the condition that arbitration of Plaintiffs' claims against First Trust and Fiserv occur
13 within California. The proceedings in this matter are stayed pending completion of the various
14 arbitration processes.

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17 DATED: July 2, 2003

(electronic signature authorized)

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19 JEREMY FOGEL
United States District Judge
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28 ¹⁴ As noted above, the motion of AIC is construed as brought on behalf of AIC and Defendant John Roslund.

1 Copies of this Order have been served upon the following persons:

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18 Counsel for the moving Defendants are responsible for distributing copies of this Order to counsel of
19 record who have not registered for electronic filing under the Court's Electronic Case File (ECF)
20 program.
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